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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 316.

JOHN A. BURNHAM AND JAMES H. BLAKE, TRUSTEES, APPELLANTS,

vs.

E. H. BOWEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED SEPTEMBER 28, 1883.

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1 Pleas in the Circuit Court of the United States for the district of Iowa, at a term thereof begun and holden at the United States court-house, in the city of Des Moines, in said district, on the third Tuesday, it being the 19th day of October, A. D. 1880, before the Honorable George W. McCrary, judge of the United States Circuit Court for the eighth circuit, and Honorable James M. Love, judge of the United States District Court for the district of Iowa, and ex-officio judge of said Circuit Court of the United States for the district of Iowa.

2 Be it remembered that heretofore, to wit, on the 18th day of October, A. D. 1878, in a certain cause in said court, wherein John H. Burnham et al., trustees, were complainants and the Chicago, Dubuque and Minnesota Railroad Company and others were defendants, and wherein E. H. Bowen was intervenor, in the record of the proceedings in said cause is the following entry, to wit:

3 United States Circuit Court, district of Iowa, October term, 1878.

FRIDAY, *October* 18, 1878.

John H. Burnham et al.
vs.
Chicago, Dubuque and Minnesota R. R. Co. } No. 678.

This cause came on this day for hearing, and E. H. Bowen was given leave to file substituted petition in lieu of lost petition.

4 And now on this 18th day of October, A. D. 1878, comes E. H. Bowen, intervenor, by Shiras, Van Duzee and Henderson, his attorneys, and files his substituted petition herein, which said substituted petition is in the words and figures following, to wit:

5 *Substituted Petition of E. H. Bowen.*

In the United States Circuit Court for district of Iowa.

John A. Burnham et al., trustee,
vs.
Chicago, Dubuque and Minnesota R. R. Company et al.

Your petitioner, E. H. Bowen, a citizen of the state of Illinois, by leave of this court files this petition in lieu of one heretofore filed and mislaid or lost from the files, and claims to be due petitioner from the respondent, the Chicago, Dubuque and Minnesota Railroad Company, the sum of five thousand eight hundred and fifteen dollars and interest, as money justly due petitioner.

For cause of said claim petitioner avers that heretofore, to wit, on the 17th day of May, 1875, the said Chicago, Dubuque and Minne-

sota Railroad Company became indebted to the Northern
6 Illinois Coal and Iron Company for coal and materials furnished said respondent for the use in the running and management of said railroad, and being so indebted the said company accepted a draft drawn on it in words and figures following:

$2,354.10. MENDOTA, ILL., *May* 17, 1875.

Four months after date pay to the order of E. D. Taylor, pres't, two thousand three hundred and fifty-four 10-100 dollars, value received, and charge the same to account of

E. D. TAYLOR,
Pres't.

To Chicago, Dubuque & Minnesota Railway Co.,
Dubuque, Iowa.

(Written across face:) Accepted; payable at Third National Bank, Chicago, Ill. C. H. Booth, treasurer of C., D. & M. R. R. Co.

Which said draft was then and there, for value received, endorsed & transferred to petitioner, who is now the owner and holder thereof.

2nd. For further cause of said claim petitioner avers that on the 16th day of June, 1875, the respondent being indebted to the
7 said Northern Illinois Coal and Iron Company for coal & materials furnished to said Chicago, Dubuque & Minnesota Railroad Company, for its use in the running and management of said railroad, accepted a draft drawn on it for such indebtedness in the words & figures following:

"$2,372.86. MENDOTA, ILL., *June* 16, 1875.

Five months after date pay to the order of E. D. Taylor, pres't, two thousand three hundred and seventy-two 86-100 dollars, value received, and charge the same to account of

E. D. TAYLOR,
Pres't.

To Chicago, Dubuque and Minnesota Railway Co.,
Dubuque, Iowa.

(Written across face:) Accepted; payable at Third National Bank, Chicago, Ill. C. H. Booth, treasurer of C., D. & M. R. R. Co.

Which said draft, for a valuable consideration, was then and there duly endorsed and transferred to your petitioner, who is now the owner & holder thereof.

Petitioner further avers that said claims were duly presented to the Circuit Court of Dubuque county, Iowa, when this pro-
8 ceeding was pending in that court, & prior to the removal thereof to this court, and the amount due petitioner was ascertained & fixed, and the receiver was ordered to pay the same, the

said claims being classed among the operating expenses of said railroad.

Petitioner further avers that said claim has not yet been paid, but remains wholly due, principal and interest, the same now amounting to the sum of $5,815.00.

Petitioner therefore prays that the order of allowance of said claim made by said Circuit Court of Dubuque county, Iowa, be enforced by this court, and that judgment be rendered in favor of petitioner for the amount due against the Chicago, Dubuque & Minnesota Railroad Company, and that such judgment be declared a lien on the property & road of said company in the hands of said trustees and their grantees, and further prays for such further orders as may be just & equitable.

9 (Signed) E. H. BOWEN,
By SHIRAS, VAN DUZEE and HENDERSON,
Attys.

(Endorsed:) 678; John A. Burnham et al., trustees, *vs.* Chicago, Dubuque & Minnesota R. R. Co. et al.; petition of E. H. Bowen; filed Oct. 18, 1878, by leave of court; E. R. Mason, clerk.

10 And on the 19th day of May, 1879, the complainants, by Grant & Grant, their solicitors, file their answer to the substituted petition of E. H. Bowen, intervenor, which said answer is in the words and figures following, to wit:

11 *Intervention of E. H. Bowen.*

In the U. S. Circuit Court, district of Iowa.

Burnham & Blake
vs.
The Chicago, Dubuque and Minnesota R. R. Company et al. } No. 678 eq.

Now comes complainants, and for answer to so much of the petition of E. H. Bowen as they are advised it is necessary for them to answer unto, and deny that there is due petitioner from the Chicago, Dubuque and Minnesota Railroad Company the sum of $5,815.00 and interest, or any other sum; deny that on May 17th, 1875, said R. R. co. became indebted to the Northern Illinois Coal & Iron Company for coal and material furnished said co. in running and management of said road, and accepted therefor the draft drawn on it for $2,354.10, set out in said petition, which said draft was endorsed & transferred to the petitioner, as alleged.

12 Deny that on June 16th, 1875, said R. R. co., being indebted to said Northern Illinois Coal and Iron Co. for coal and material furnished said R. R. co. for use in running & management of said road, accepted a draft drawn on it for such indebted-

ness of $2,372.86-100 set out in said petition, which said draft was endorsed and transferred to said petitioner who now owns the same, as alleged.

Deny that said claim was presented to the Circuit Court of Dubuque county, Iowa, when this proceeding was pending therein prior to its removal to this court, and the amount due petitioner was fixed and the receiver ordered to pay the same, said claim being classed among operating expenses of said road.

Admits that said alleged claim may not be paid, but deny that the same is now due from these complainants.

For further answer, complainants state that long prior to the accruing of said claim, said C., D. and M. R. R. Co. executed
13 and delivered to these complainants as trustees, its certain mortgage or trust deed, which was immediately duly recorded in all the counties through which said road runs in Iowa, to secure the bonds of said co. That said mortgage covered all the property of said road then owned or thereafter to be acquired, including its revenues, income, &c., which said mortgage has been foreclosed herein. The said property sold to satisfy said mortgage lien. That said R. R. co. is totally and hopelessly insolvent. That when said road was placed in the hand of a receiver no revenues or income of said road came into his hands.

That whatever income he derived from the use & operation of said road was necessary for and was used in operating, preserving, & repairing said road under the order & direction & with the approval of this court, and no funds were by him turned over to the purchasers of said property, and none on which said claim was a lien, or out of which it could be paid; that the claim of petitioner is no lien
14 upon said property & road, or its income & revenues, and whatever lien or claim he has is junior and inferior to the lien & claim of complainants; that said claim is no part of the operating expenses of said road; that the allowance of said claim, if at all by said Circuit Court, was not an allowance thereof as a lien upon said property or fund, but simply a finding and fixing of the amount thereof, and the order of said court herein so states.

That claimant is not entitled to any lien for said claim upon said fund at law or in equity.

Wherefore complainants pray that said petition be dismissed with costs.

(S'g'd) GRANT & GRANT,
For Complainant.

(Endorsed:) No. 678; in U. S. C. Ct., d. of Ia.; Burnham et al. *vs.* C., D. & M. R. R. Co. et al.; answer to intervention of E. H. Bowen; filed May 19, 1879; E. R. Mason, clerk; Grant & Grant, for compl'ts.

15 And on the 29th day of October, 1880, there was filed in the clerk's office of said court an agreed statement of facts,

which said agreed statement is in the words and figures following, to wit:

16 *Intervention of E. H. Bowen.*

In the United States Circuit Court for Iowa.

John A. Burnham et al.
vs.
The Chicago, Dubuque and Minnesota R. R. Company et al.

In the matter of the intervention of E. H. Bowen, pending in the above-entitled cause, the following facts are stipulated and admitted for the purpose of hearing and determination of such intervention:

1st. The claim of the intervenor is evidenced by two drafts or acceptances, one dated May 17th, 1875, for the sum of $2,354.10; the other dated June 16th, 1875, for $2,572.86, payable in 4 & 5 months, and accepted by C. H. Booth, treasurer of the Chicago, Dubuque and Minnesota R. R. Company, of which said drafts copies are
17 hereto annexed and made part thereof, the said Bowen being the owner thereof.

2nd. That said drafts or acceptances were given as evidence of indebtedness due and owing from said Chicago, Dubuque and Minnesota R. R. Company, being given in renewal of other drafts of earlier date, accepted by said company, the consideration of which was coal furnished to said C., D. & M. R. R. Co., and used in running its locomotives along the line of its road, the said coal being so furnished and used in the year 1874, and before the commencement of foreclosure proceedings, which were commenced in January, 1875.

No part of the net income of the road was at any time applied to the payment of the interest on the bonds secured by the mortgage named in this suit, and the R. R. co. is insolvent.

(Signed) GRANT & GRANT,
Sol's for Trustees.
SHIRAS, VAN DUZEE & HENDERSON,
For Intervenor.

18 *"Exhibit A."*

$2,354.10. MENDOTA, ILL., *May* 17, 1875.

Four months after date pay to the order of E. D. Taylor, pres't, two thousand three hundred and fifty-four 10-100 dollars, value received, and charge the same to account of—

E. D. TAYLOR, *Pres't.*

To Chicago, Dubuque, and Minnesota Railway Co., Dubuque, Iowa.

(Endorsed:) E. D. Taylor, pres't.

(Written across the face:) Accepted; payable at Third National

Bank, Chicago, Ill.; C. H. Booth, treasurer of C., B. and M. R. R. Co.

"Exhibit B."

$2,572.86. MENDOTA, ILL., *June* 16, 1875.

Five months after date pay to the order of E. D. Taylor, pres't, two thousand three hundred and seventy-two 86-100 dollars, value received, and charge the same to account of—

E. D. TAYLOR, *Pres't.*

To Chicago, Dubuque, and Minnesota Railway Co., Dubuque, Iowa.

(Endorsed:) E. D. Taylor, pres't.

(Written across the face:) Accepted; payable at Third National Bank, Chicago, Ill.; C. H. Booth, treasurer of C., B. and M. R. R. Co.

19 In United States Circuit Court for Iowa.

Intervention of E. H. Bowen.

John A. Burnham et al.
vs.
C., D. & M. R. R. Company et al.

In above cause it is admitted that in 1871 the C., D. and M. R. R. Company contracted with Margaret Henijes for the purchase of lots 517 & 518 in the city of Dubuque, Iowa, with the double brick building thereon, being the premises occupied for the depot and offices of the company in Dubuque, for the price of $7,000, to be paid in seven payments of $1,000 each, payable annually, with interest.

June 5th, 1876, a decree of foreclosure was rendered on this property in favor of Margaret Henijes against the C., D. and M. R. R. Co. for $7,898, balance then due, and this sum was paid up by monthly payments, beginning June 5th, 1875, and ending
20 Sept. 4, 1876, the total payments aggregating $7,998, including interest.

The premises have ever since the purchase and are now used as the depot and offices of the C., D. & M. R. R. Co. and its successor, and were covered by and included in the foreclosure decree rendered in the above-entitled cause of John A. Burnham, et al. *vs.* C., D. and M. R. R. Co., et al., and passed thereby to the trustees under such decree for the benefit of the bondholders.

The money used in making the payments aggregating the said sum of $7,998, above set forth, were derived from the ordinary income of the railroad derived from its freight and passenger business and other sources, not including, however, any money received from sale of bonds of said R. R. company.

It appears from the books of the company that the sum of

21 $14,897.94 was paid in 1876 ($5,000 being paid June 28th and $9,897.94 Nov. 1), in settlement of judgment for right of way over certain realty in Brownsville, Minn., owned by Rippe, the judgment therefor having been rendered Jan'y 8, 1875, and the right of way having been taken previous to that date and before the commencement of foreclosure proceedings against said C., D. and M. R. R. Co. in favor of the mortgage bondholders.

It also appears, from the books of the company, that the following amounts were paid for the right of way in settlement of judgments rendered:

1875.		
Aug. 21.	W. Caffray	$115 00
Sept. 5.	Hugh Doner	300 00
Oct. 27.	" "	530 55
1876.		
March 6.	W. H. Harris	125 00
April 20.	J. Sullivan	100 00
April .	T. B. Cleaver	1,150 00
Aug. 14.	August Jenks	350 00
" "	Schulte & Wagner	350 00
		$3,020 55

22 These several rights of way were taken by the C., D. and M. R. R. Co. before the commencement of foreclosure proceedings, as above stated; and the rights thereby acquired have ever since & are now in use by said railroad, and passed by the foreclosure of the mortgage to the trustees for the bondholders.

The money used in making the payments for all said rights of way were derived from the ordinary income of the railroad derived from its freight and passenger business & other sources, not including, however, any money received from sale of bonds of said R. R.

(Signed) SHIRAS, VAN DUZEE & HENDERSON,
Att'ys for Bowen.

(Signed) GRANT & GRANT, *Att'ys for Trustees.*

Aug. 20, 1880.

(Endorsed:) John A. Burnham et al. *vs.* C., D. & M. R. R. Co. et al.

23 In Circuit Court United States, district of Iowa.

John A. Burnham et al.
No. 678.] *vs.* } Equity.
C., D. and M. R. R. Co. et al.

Intervention of E. H. Bowen.

It is admitted in this case that the payments of moneys hereinbefore admitted to have been made for depot grounds & right of way

were made by the receiver under the direction and with the approval of this court and of the Circuit Court of Dubdque county when said cause was pending in that court.

The decree of Oct. 28th, 1876, in this cause ordering the property turned over to the trustees is hereby referred to and made part hereof.

The decree of this court of May 28th, 1877, approving report of master on final report of the receiver and ordering balance
24 funds in his hands paid into court, made part hereof.

No funds were turned over by the receiver to the trustees or purchasers under said decree of Oct. 28, '76, but the balance of such funds paid into this court and have been paid out under its direction.

The bill of foreclosure was filed in this cause in Circuit Court Dubuque county in January, 1875, and the transcript in this court January 11th, 1876. Receiver appointed by state court January 13, 1875, and by U. S. Ct. Court June 23, 1876. January 5th, 1876, S. Bagg, judge said Circuit Court Dubuque county, entered an order in said cause in reference to the claim of said E. H. Bowen et al., as follows, (front, p. 189:) "This allowance not intended to allow or establish any lien, but simply to allow them to be presented and determined as to their rights of payment on final hearing."

"This allowance" being the order of payment referred to
25 in the petition of intervention herein.

No funds came into the hands of the receiver of said property from said C., D. and M. R. R. Co. when he took possession of the same.

All the records, proceedings, and orders of the courts in this cause, in so far as they are competent, are considered as in evidence on the hearing hereof, and either party may refer to and use the same for that purpose.

(S'g'd) SHIRAS, VAN DUZEE & HENDERSON;
For E. H. BOWEN.

(S'g'd) GRANT & GRANT, *Att'ys for Trustees.*

Oct. 27th, 1880.

(Endorsed:) Eq. 678; Burnham et al. *vs.* C., D. and M. R. R. Company et al.; agreed facts on claim of E. H. Bowen; filed & read on hearing Oct. 29, 1880; E. K. Mason, clerk.

26 United States Circuit Court, district of Iowa, October term, 1876.

SATURDAY, *October* 28, 1876.

John A. Burnham and James H. Blake, pl'ffs,
vs.
The Chicago, Dubuque and Minnesota Railroad Company, The Chicago, Burlington and Quincy Railroad Company, The Haskell and Barker Car Company. } No. 678.—Eq.

Decree.

This cause coming up for final hearing this 28th day of October, A. D. 1876, upon the bill of compaint and the answer thereto by the said Chicago, Dubuque and Minnesota Railroad Company,
27 and on the answer and cross-bill of the Chicago, Burlington and Quincy Railroad Company, the complainants appear by their attorneys, James Grant and George Crane; the Chicago, Dubuque and Minnesota Railroad Company appears by its attorneys, Fouke and Lyon; the Chicago, Burlington and Quincy Railroad Company appears by its attorney, James Grant and J. N. Walker.

And thereupon the Chicago, Dubuque and Minnesota Railroad Company, by its solitors, withdraws its answer filed in this cause in July, 1876, and files an answer admitting the allegations of the plaintiff's bill and thereupon the court finds that the defendant, the said Chicago, Dubuque and Minnesota Railroad Company, on the first day of June, A. D. 1871, executed and delivered to said John A. Burnham, James H. Blake, the petitioners, and Stephen
28 V. R. Thayer, its deed of trust conveying to them all the property of said railroad company and all the property that company might thereafter acquire, and all the right, title, interest and equity of redemption therein; that is to say, all the railroad of said company then made and thereafter to be constructed, extending from the city of Dubuque, in the state of Iowa, (the point of connection between the Illinois Central Railroad Company and the Dubuque and Sioux City Railroad, then under one management,) in a northerly course along or near the west bank of the Mississippi river, through Guttenberg, McGregor, and Lansing, to the town of Winona, in the state of Minnesota, a distance of about one hundred and sixty miles, and a branch under the same name to leave the main line about twenty-five miles from Dubuque, thence along or
29 near the valley of the Turkey river, in a northwesterly direction by the best and most practicable route to the southerly bank of the Minnesota river, near Mankato, in the state of Minnesota, or however said branch might be thereafter located in conformity with its charter or any amendment thereof, including the right of way for said main line and branch, their roadbeds, superstructure, irons, ties, chairs, spikes, bolts, nuts, and all the land and depot grounds, station houses, depots, viaducts, bridges, timber and

materials and property purchased or to be purchased for the construction of the said railroad, and all the engines, tenders, cars, and machinery, and all kinds of rolling stock then owned or to be thereafter purchased by said company, for, and to be used upon said railroad, and all the revenues and incomes of said railroad,
30 and all the franchises and rights of said company relating thereto and property acquired by virtue thereof, then in possession or thereafter to be acquired, including machine-shops, tools, implements, and personal property used therein or along the line of said railroad; and that under said mortgage there were issued and sold bonds in sums of one thousand dollars each, due in twenty-five years, amounting to four million four hundred and twenty-five thousand dollars, with interest, payable semi-annually on the first days of December and June of each year, at the rate of eight per cent. per annum, and that the defendant has failed to pay the interest on said bonds on and after the first days of , A. D. ; that said Stephen V. R. Thayer departed this life soon after the execution of said mortgage, and that no successor was ever appointed to
31 fill the office of said Thayer, but the duties of said trusteeship have always, since the death of said Thayer, been performed and fulfilled by the said complainants, and that one-tenth and more of the bondholders have requested the complainants to begin proceedings to foreclose said mortgage; that it is provided in said deed of trust or mortgage that upon a default for a period of thirty days to pay said bonds and the interest thereon, or any part thereof, then the boadholders may declare the whole principal of said bonds to be immediately due and payable; that said defendant has failed to pay the interest, as above set forth, and that the whole debt and interest have become due on said mortgage, in pursuance of the terms thereof, and there now, on this 27th day of October, A. D. 1876, due on said mortgage the said sum of five million nine hundred
32 and eighty thousand one hundred and sixty-six dollars, ($5,980,166,) which said sum of money, with eight per cent. interest per annum thereon till paid, together with the costs of this suit, the defendant, the said Chicago, Dubuque and Minnesota Railroad Company, is ordered and decreed to pay the said complainants within ninety days from this date, and upon the payment thereof, as aforesaid, it is ordered that the plaintiffs reconvey said premises and all the property hereinbefore mentioned to said defendant, The Chicago, Dubuque and Minnesota Railroad Company, free of incumbrances by the said plaintiffs, or those claiming under them, and deliver up all deeds and writing in relation thereto to said Chicago, Dubuque and Minnesota Railroad Company.

33 But in default of said payment to the plaintiff of said principal and interest and costs by the time aforesaid, it is ordered and decreed that the said defendant, the Chicago, Dubuque and Minnesota Railroad Company, and all persons claiming under it, do stand absolutely barred and foreclosed of all right, title, and interest, equity of redemption in the mortgaged premises and the

right and title to all of said property shall be vested in said complainants free from all right, title, or equity of redemption in said Chicago, Dubuque and Minnesota Railroad Company.

Said defendant, the said railroad company, to pay the costs of this suit.

And it is further ordered that said trustees have immediate possession from the date of this decree of said property and the net income thereof from the commencement of this suit, and said
34 John Thompson, the receiver appointed by this court, is ordered to deliver to said trustees the said property forthwith, and upon the settlement of his accounts to deliver to said parties any balance which may be found to be due from him, as such receiver, to said plaintiff.

But before the said net income thereof or money on hand shall be paid over to said trustees by said receiver, the trustee must file with the clerk of this court a bond with sufficient sureties to be approved by the clerk of this court, stating the amount of money so received by them and conditioned that they will hold the amount named by them from the said receiver subject to any future order of this court for the benefit of the Haskell and Barker Car Co., in case they shall hereafter be adjudged entitled thereto, or any part thereof.

35 And it is further ordered and decreed, that when the accounts of Clarendon Harris, receiver appointed by the state court, are audited by the master under the order of this court heretofore made, that any balance found to be in his hand, or due from persons to whom he has paid the same, which the court may determine to belong to the mortgage found in which the mortgagees or others now in *now in* court may have any right, shall be paid into court for the benefit of the plaintiff or such of the defendants as the court may determine in the further hearing of this cause.

It is ordered that the said Chicago, Dubuque and Minnesota Railroad Company shall, in case said property is not redeemed as herein provided, shall make a deed to said complainants conveying
36 to them all the right, title and interest of the said last-mentioned railroad company in and to the property hereinbefore mentioned, and every part thereof, at the expiration of the said ninety days, and the said defendant, the railroad company last mentioned, hereby consents to all the terms of this decree.

It is further ordered that the bill of complaint filed by the Iowa Pacific Railroad Company be and is hereby dismissed without prejudice.

It is further decreed that this cause, with all the matters in controversy between the plaintiffs and all and any of the defendants and intervenors and claimants, is continued until the next term of this court, and such rights and claims and matters in controversy are in no wise affected or determined by this decree.

37 And the said trustees and all persons claiming under them, take said property under this decree, subject to such orders

and decrees, charges and liens, as may hereafter be made or ordered or decreed concerning such claims, interventions, and demands, at the instance and upon the motion of John M. Forbes and others who are interested in this decree, as holders of some of the bonds upon which this suit is founded: *Provided*, That this decree is taken subject to the provisions of the agreement entered into under date of July 9, 1875, and the right is hereby reserved to the mortgage bondholders to litigate in this cause hereafter or otherwise, any and all of the questions specified in said agreement, it being under-
38 stood that the matter of the priority of certain bonds over others, and the right of certain bondholders to be preferred over others in said mortgaged property and the proceeds thereof, and all right to damages or personal claims on behalf of any of said bondholders against the parties signing said agreement of July 9, 1875, are hereby expressly reserved for future consideration and determination unaffected by the provisions of this decree.

(Signed) JOHN F. DILLON.
(Signed) J. M. LOVE.

39 United States Circuit Court, district of Iowa.

May Term, 1877.

MONDAY, *May 28th*, 1877.

John A. Burnham
vs.
The Chicago, Dubuque and Minnesota Railway Company, } No. 678. Eq.

and

John N. Dennison
vs.
The Chicago, Clinton and Dubuque Railway Company. } No. 679. Eq.

This cause this day came on to be heard upon the reports of the master to whom it was referred to examine and pass the final accounts and reports of John Thompson, heretofore appointed receiver in these causes, to which reports of master there being no exceptions the same are hereby in all respects confirmed, and thereupon
40 upon consideration thereof it is adjudged, ordered and decreed that of the balance of money reported in said receiver's hands, viz.: the sum of four thousand one hundred and eleven 61-100 dollars—the said receiver be allowed to retain the sum of thirteen hundred dollars for increased pay and incidental and necessary expenses in the management and operation of said railway, and that the balance of the said money herein first stated he deposit with the clerk of this court to abide the further order of this court, and upon the said receiver filing the receipt of said clerk in the papers in this cause then he shall thereupon be discharged from all further duties and liabilities of such receiver, and his bond as such receiver herein filed shall be vacated and his sureties thereon be discharged.

(S'gd) J. M. LOVE,
Judge.

41 The complainant, to sustain the issues on his part, introduced and read on the hearing the trust deed under which the foreclosure was had, of which the following is a true copy, to wit:

42 *Deed of trust.*—Filed for record Aug. 2, 1871, 9 o'clock a. m.

Chicago, Dubuque & Minn. R. R. Co. to John A. Burnham and others.

This indenture, made this first (1) day of June, in the year of our Lord one thousand eight hundred and seventy-one (1871), between the Chicago, Dubuque & Minnesota Railroad Company, a corporation duly organized under and in accordance with the laws of the state of Iowa and Minnesota, party of the first part, and John A. Burnham, Stephen V. R. Thayer, and James H. Blake, of Boston, in the state of Massachusetts, trustees herein and parties of the second part, witnesseth:

That whereas the said Chicago, Dubuque and Minnesota Railroad Company, pursuant to the terms of the statutes and acts of the legislature of the state of Iowa and Minnesota creating it, and
43 of the organization of the said company under and in accordance therewith, is authorized to construct a railroad to extend from Dubuque, in the county of Dubuque, in said State of Iowa, in a northerly direction, along or near the west bank of the Mississippi river, to the town of Winona, in said state of Minnesota, and is at present engaged in the construction of that part of said road which extends from Dubuque to La Crescent, in the state of Minnesota, a distance of about one hundred and thirty (130) miles; and said company is further authorized to construct a branch under the same name, to leave the main line about twenty-five miles from Dubuque, and follow up Turkey creek, in a northwesterly direction, to or towards the southern bend of the Minnesota river near Mankato, in the state of Minnesota, or howsoever said branch may be located, in conformity with its charter or any
44 amendments thereto, & and has already located said main line and graded some portion thereof. And whereas the said Chicago, Dubuque & Minnesota Railroad Company is desirous of borrowing money to an amount not exceeding twenty-five thousand ($25,000) dollars per mile on the length of the road and of said branch, to aid in the construction of, and to be applied to, the purchase and transportation of, or in payment for materials, superstructure, and equipments therefor, and other corporate purposes, and has resolved to execute from time the bonds of said company therefor, in sums of one thousand ($1,000) dollars each, bearing date on the first day of June, A. D. one thousand eight hundred and seventy-one, (1871,) having twenty-five (25) years to run to maturity, bearing interest at the rate of eight (8) per cent. per annum, free of government tax, and payable semi-annually in the first days
45 of December and June in each year, at the office of the Chicago, Burlington and Quincy Railroad Company, in the

city of Boston, where both principal and interests are made payable, or at such other place in said city as the said company may designate for that purpose, all of which said bonds are to bear the same date, and whensoever issued are to stand equally secured by this deed of trust, and are to be duly stamped with the revenue stamps required by law, and are to be numbered consecutively from number one (1) to the highest number which may be issued, inclusive; each of which said bonds is to be authenticated by a certificate signed by at least two (2) of the trustees named in this deed of trust; and said company has further resolved to issue at the present time
\$2,400.000 of said bonds to aid in the construction of that
46 part of its road extending from Dubuque to La Crescent—

Now, therefore, this indenture witnesses, That the said Chicago, Dubuque and Minnesota Railroad Company, in order to secure the payment of its bonds thus issued and to be issued, and the interest thereon, and in consideration of the sum of five (\$5) dollars to it in hand paid by the parties of the second part at the unsealing and delivery of these presents, the receipt of which is hereby acknowledged, has granted, bargained, sold, transferred, and conveyed, and by these presents doth grant, bargain, sell, transfer, and convey to the said parties of the second part, their successors in said trust and assigns, all the following and all the above-described property, to wit:

All the present and in future to be acquired property of the said
railroad company in and relating to the said railroad, and all
47 the right, title, interest, and equity of redemption therein;
that is to say, all the railroad of said party of the first part now made and to be constructed, extending from the city of Dubuque, in the state of Iowa, (the point of connection between the Illinois Central Railroad & Dubuque and Sioux City Railroad, now under one management,) in a northerly course along or near the west bank of the Mississippi river, through Guttenburg, McGregor, and Lansing, to the town of Winona, in the state of Minnesota, a distance of about one hundred and sixty miles (160), and a branch under the same name, to leave the main line about twenty-five (25) miles from Dubuque, thence along or near the valley of Turkey river in a northwesterly direction by the best and most practicable route to the southerly bend of the Minnesota river near Mankato,
in the state of Minnesota, or howsoever said branch may be
48 located, in conformity with charter or any amendments thereof,
including the right of way for said main line and branch, their road-beds, superstructure, iron, ties, chairs, splices, nuts, bolts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber and materials, and property purchased or to be purchased for the construction of said railroad, and all the engines, tenders, cars and machinery, and all kinds of rolling stock now owned or to be hereafter purchased by said party of the first part for and to be used upon said railroad, all the revenues and income of said railroad, and all the franchises and rights of said party

of the first part relating thereto and property acquired by virtue thereof now in possession or hereafter to be acquired, including machine shops, tools, implements, and personal property used
49 therein or along the line of said railroad; to have and to hold the said railroad and property, and all and singular the said premises and every part thereof, with the appurtenances, unto the said parties of the second part, their successors in said trust and assigns, but for the following purposes and upon the following express trust; that is to say:

In case the said Chicago, Dubuque and Minnesota Railroad Company "shall fail to pay the principal or any part thereof, or any of the interest, or any of the bonds secured or intended to be secured hereby, at any time when and where the same may become due and payable according to the tenor thereof, and for thirty (30) days thereafter, then and in such case, at the request of the holders of one-tenth of said bonds, the parties of the second part, their successors in said trust or assigns, may enter into and take possession of
50 all and singular the railroad, premises, and property hereby conveyed, and as the attorneys in fact or agents of said first party, by themselves, or their agents duly constituted, have, use, and employ the same, making from time to time all needful repairs, alterations, and additions thereto, and after deducting the expenses of such use, repairs, alterations, and additions, and their own reasonable compensation, apply the proceeds of said premises to the payment of the principal and interest of all such bonds remaining unpaid, and this whether said bonds shall have become due or otherwise, giving priority, however, to overdue interest; or the said parties of the second part, their successors in said trust or assigns, at their discretion may, and on the written request of the holders of one-tenth of said bonds then unpaid shall, cause the said premises to be sold at public auction at Des Moines city, Iowa, or at St. Paul, in the state of Minnesota, after giving sixty days' notice of the time and
51 place and terms of such sale by publishing the same at least once in each week in one of the principal newspapers for the time being, published in each of the cities of New York and Boston, Des Moines city, and St. Paul, and upon such sale to execute to the purchaser or purchasers thereof a good & sufficient deed or deeds of conveyance in fee-simple for the same, which shall be a bar against the said Chicago, Dubuque and Minnesota Railroad Company, party of the first part, its successors and assigns, and all persons claiming under it or them, of all right, interest, or claim in and to the said premises, or any part thereof; and the said trustees shall, after deducting from the proceeds of said sale the cost and expenses thereof, and of managing the said property, and enough to indemnify
52 and save themselves harmless from and against all liabilities arising from this trust, apply so much of the proceeds of said property as may be necessary to the payment of the principal and interest of said bonds remaining unpaid, whether the same may then be due and payable or otherwise, and shall restore the residue

thereof to the said party of the first part, its successors and assigns, it being expressly understood and agreed that in no case shall any claim be made or advantage taken of valuation, appraisement, redemption, or extension laws by said parties of the first part, its successors or assigns, nor injunction or stay of proceedings be had, or any process be obtained or applied for by it or them to prevent such entry, sale, and conveyance as aforesaid.

It is also hereby understood that it shall be lawful for the said railroad company, party of the first part, or its assigns, to
53 dispose of the current net revenues of said road hereby conveyed, as it or they shall elect, until default shall be made in the payment of the principal or interest of said bonds, or of some one or more of them.

And the said party of the first part, for itself and its successors, hereby covenants and agrees to execute and deliver any further reasonable and necessary conveyance of the said premises, or any part thereof, to the said party of the second part, their successors in said trust and assigns, which counsel may advise for the more fully conveying the said premises and carrying into effect the objects and purposes of these presents, and of making them embrace the property and effects so conveyed or intended to be conveyed.

It is hereby mutually agreed that upon the payment of the
54 principal and interest of said bonds the estate hereby granted to said parties of the second part shall be void, and the right to the premises and property hereby conveyed shall revert to and revest in said party of the first part, its successors and assigns, without any acknowledgment of satisfaction, reconveyance, re-entry, or other act.

And it is also hereby mutually agreed that the said parties of the second part, their successors in said trust and assigns, shall only be accountable for reasonable diligence in the management thereof, and shall not be responsible for the acts of any agent employed by them when such agents shall have been employed with reasonable discretion, and that the said parties of the second part, and their successors in said trust and assigns, shall be entitled to reasonable compensation for their labor and services in the management of said trust.

55 It is further agreed and understood that the said trustees shall not in any manner be responsible for the acts of each other to which they do not severally assent; and that in case of the death, mental incapacity, resignation of any one of the said trustees to act in the matter of said trust, all his right, estate, interest, power, and control in the premises shall be divested, cease, and determine, muand the said railroad company and the surviving trustees may tually agree upon a new trustee to supply the said vacancy; or, failing so to agree, the said party of the first part, or its successors, may, or in case of its failure to take proceedings therefor for thirty (30) days the holder of a majority of said bonds may apply to any court in the said

state of Iowa or Minnesota having jurisdiction of the premises
56 to appoint a new trustee to supply said vacancy, and such new trustee appointed in the manner aforesaid shall become vested, for the purposes aforesaid, with all the rights and interest requisite to enable him to execute with the others the purposes of this trust without any further assurance or conveyance of the same.

But should it be desirable or necessary, the said parties hereto shall all execute and deliver such releases and conveyances as counsel shall advise; it being further expressly understood that the surviving trustee or trustees shall be fully empowered to execute all the purposes of this trust until said vacancy shall be so supplied.

It is also expressly understood and agreed that no bonds shall be deemed to be secured by or issued under this mortgage unless
57 the same is countersigned by a majority of the trustees herein named, or their successors in said trust, and that the proceeds of the above-mentioned bonds of said first party, or so much thereof as may be necessary for that purpose, shall be applied to the construction and completion of the main line of the aforesaid railroad, and the branch above mentioned, and the objects and purposes above mentioned, and not otherwise.

And it is hereby expressly agreed and understood that the $25,000 per mile of the bonds herein mentioned and authorized to be issued for the construction of said branch shall not be issued by said trustees until in their opinion the interests of said company shall require its construction; and when in the opinion of said trustees the interests of said company shall require the construction of said branch, the bonds for that purpose may be issued from time to time
58 as fast as they shall be required to construct and equip the same, and the said parties of the second part hereby accept the trust created by these presents.

In witness whereof, the said Chicago, Dubuque and Minnesota Railroad Company has caused its corporate seal to be hereto affixed, attested by its secretary, and its corporate name to be hereunto subscribed by its president; and the said parties of the second part have also hereunto set their hands and seals, all on the day and year first above written.

[SEAL.] CHICAGO, DUBUQUE AND MINNESOTA R. R. CO.,
By J. K. GRAVES,
President.

[SEAL.] Attest: PETER KIENNE, JR.,
Secretary.

JOHN A. BURNHAM,
JAMES H. BLAKE,
Trustees.

59 And on the 30th day of October, 1880, it being in the October term, 1880, of said court, in the record of the proceedings thereof is the following decree, to wit:

60 In United States Circuit for Iowa.—October Term, 1880.

Decree in matter of Intervention of E. H. Bowen.

John A. Burnham et al.
vs.
Chicago, Dubuque and Minnesota R. R. Co. et al.

SATURDAY, *October* 30, 1880.

This cause coming up for further hearing upon the matter of intervening petition of E. H. Bowen, and parties appearing by counsel, the said cause was submitted to the court upon the pleadings and agreed statement of facts, and the court, having duly considered the same, finds the issue in favor of said intervenor, and that he is entitled to relief as prayed for.

It is therefore ordered, adjudged, and decreed, that there is now justly due said E. H. Bowen, intervenor, as aforesaid, the sum of six thousand five hundred and fifteen 42-100 dollars for
61 coal furnished to the Chicago, Dubuque and Minnesota Railroad Company, and used upon the line of railroad heretofore owned by said company; that said E. H. Bowen have and recover judgment for said sum of $6,515.40, with interest and costs taxed at against said Chicago, Dubuque and Minnesota Railroad Company.

It is further ordered and decreed that the property, real and personal, included in and covered by the trust deed set forth in the bill of foreclosure filed in this cause, being the property that passed to said John A. Burnham et al., trustees, under the decree of foreclosure entered at the October term 1876, of this court, for the benefit of the mortgagee bondholders, is equitably bound for the payment of said sum found due said Bowen, as aforesaid, said property having passed to said trustees subject to the rights and equities of said Bowen, intervenor, and said trustees, and all parties
62 holding under them, taking said property subject to such rights and equities on part of said Bowen, intervenor.

It is further ordered and decreed that if said sum so adjudged to be due said E. H. Bowen, with interest and cost, is not paid within sixty days from the date hereof, that so much of said property heretofore belonging to said Chicago, Dubuque, and Minnesota Railroad Company, and passing to said trustees under said decree of October term, 1876, as shall be necessary to realize the amount due said E. H. Bowen, with interest and costs, shall be sold at public auction at the United States court-house, in Des Moines, after given four weeks' notice of such sale by publication in The Des Moines Daily Register. P. T. Lomax, one of the masters of this court, is directed to conduct such sale and make full report thereof to this court.

(S'g'd) J. M. LOVE, *Judge.*

63 And on the 14th day of December, 1880, the complainants, by Grant and Grant, their solicitors, file their petition for an appeal, which said petition is in the words and figures following, to wit:

64 In the United States Circuit Court, district of Iowa.

John A. Burnham et al.
vs.
Chicago, Dubuque & Minnesota Railroad Company et al.

Intervention of E. H. Bowen.

Now come the complaintants, John A. Burnham and James H. Blake, trustees, and pray the court for an appeal from the judgment, order, and decree rendered in the above-entitled cause on the 30th day of October, A. D. 1880, for the sum of $6,515.42, with interest and costs, in favor of E. H. Bowen, intervenor, and against said complainant, to act as a supersedeas.

(Signed) JOHN A. BURNHAM,
JAMES H. BLAKE,
Trustees.
By GRANT & GRANT,
Their Solicitors.

(S'g'd) JAMES GRANT,
Of Counsel.

65 And on the same day, to wit, December 14, 1880, in the record of the proceedings in said cause is the following order, to wit:

66 In the United States Circuit Court, district of Iowa.

John A. Burnham et al.
vs.
Chicago, Dubuque & Minnesota Railroad Company et al.
No. 678. Equity.

Intervention of E. H. Bowen.

Upon the application of John A. Burnham and James H. Blake, trustee, complainants in the above-entitled cause, an appeal is hereby allowed from the judgment order and decree rendered in the above-entitled cause on the 30th day of October, 1880, in favor of E. H. Bowen, intervenor, and against the said trustees, complainants, upon giving bond in the sum of one thousand dollars, ($1,000,) to be approved by one of the judges of this court, said bond, when so approved, and filed to act as a supersedeas at chambers.

Dec. 10th, 1880. (S'g'd) J. M. LOVE, *Judge.*

67 (Endorsed:) In U. S. Cir. Ct., dist. of Iowa; No. 678 equity; John A. Burnham et al. *vs.* C., D. and M. R.R. Co. et al.; intervention, E. H. Bowen: application for an order allowing appeal; filed Dec. 14, 1880; E. R. Mason, clerk.

68 And on the 14th day of December, 1880, an appeal bond was filed in said clerk's office, which said appeal bond is in the words and figures following, to wit:

69 In the United States Circuit Court, district of Iowa.

John A. Burnham *et al.*, trustees,
vs.
Chicago, Dubuque & Minnesota R. R. Co. *et al.* } No. 678.

Intervention of E. H. Bowen.

Know all men by these presents, that we, John A. Burnham and James H. Blake, trustees, as principals, and Alexander Mitchell, as security, are held and firmly bound unto E. H. Bowen in the penal sum of one thousand dollars, for payment of which, well and truly to be paid, we hereby bind ourselves, our heirs, executors, and assigns, firmly by these presents.

Dated this 30th day of November, A. D. 1880.

The condition of this bond is such, that whereas the said John A. Burnham and James H. Blake, trustees, have appealed from the judgment or order of the United States Circuit Court for the district of Iowa, made at the October term A. D. 1880, in

70 a certain cause therein pending, wherein John A. Burnham, trustee, et al., are complainants, and the Chicago, Dubuque and Minnesota R. R. Co., et al., are defendants, in favor of E. H. Bowen, intervenor in said cause, to the Supreme Court of the United States:

Now, if the said trustees shall prosecute said appeal to take effect, and shall answer and pay all costs and damages that shall be adjudged against them, and shall satisfy and perform the judgment and decree appealed from, in case it be affirmed, and any judgment, decree, or order which said Supreme Court may render or order to be rendered by said Circuit Court, or if said trustees shall make good their appeal and reverse the said decree or judgment appealed from, then this obligation to be null and void and of no effect, or else to remain in full force and virtue.

(Signed,) JOHN A. BURNHAM,
JAMES H. BLAKE,
Trustees.
[SEAL.]

71 By GRANT & GRANT,
Solicitors.

(S'g'd,) AL'X MITCHELL.

EASTERN DISTRICT OF WISCONSIN, } *ss:*
Milwaukee County, }

Alexander Mitchell, being duly sworn, says that he is worth the sum of fifteen thousand dollars over and above all his debts and liabilities, and above all property exempt from execution under the law of the state of Wisconsin.

(Sg'd,) AL'X MITCHELL.

Subscribed and sworn to before me this 30th day of November, 1880.

(Sg'd,) MELBERT B. CARY,
Notary Public, Mil. Co., Wis.

This bond approved this 10th day Dec., 1880.

(Sg'd,) J. M. LOVE, *Judge.*

(Endorsed:) In U. S. Cir. Ct., District of Iowa, No. 678 Equity; John A. Burnham et al. *vs.* C., D. and M. R. R. Co. et al.; intervention, E. H. Bowen; appeal bond; filed Dec. 14, 1880.

E. R. MASON, *Clerk.*

72 And on the 30th day of December, 1880, a citation was filed in said clerk's office, which said citation is in the words and figures following, to wit:

73 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to E. H. Bowen:

Whereas John A. Burnham and James H. Blake, trustees, have lately appealed to the Supreme Court of the United States from a decree lately rendered in the Circuit Court of the United States for the district of Iowa in your favor, on or about the 30th day of October, A. D. 1880, in a certain cause therein pending, entitled John A. Burnham et al. *vs.* Chicago, Dubuque and Minnesota R. R. Co., wherein you were intervenor, and the said trustees having given the security required by law:

You are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises, and show cause, if any there be, why said decree should not be corrected, and why speedy justice should not be done in that behalf.

Given under my hand at the city of Keokuk, in the district of Iowa, in the eight circuit, this 10th day of December, A. D. 1880.

J. M. LOVE, *Judge.*

74 Due service of within citation is hereby acknowledged, with receipt of copy, this 16th day of December, 1880, at Dubuque, Iowa.

E. H. BOWEN,
By SHIRAS, VAN DUZEE & HENDERSON,
Their Attorneys.

(Endorsed :) Dist. of Iowa ; No. 978 equity ; John A. Burnham et al. *vs.* C., D. & M. R. R. Co. et al. ; intervention of E. H. Bowen ; citation ; filed Dec. 30, 1880 ; E. R. Mason, clerk.

75 UNITED STATES CIRCUIT COURT, }
Central division, district of Iowa. }

I, Edward R. Mason, clerk of said court, do hereby certify that the foregoing transcript contains full, true, and complete copies of record and proceedings, and all things concerning the same in the matter of the intervening petition of E. H. Bowen, in a certain cause wherein John A. Burnham and James H. Blake, trustees, are complainants, and the Chicago, Dubuque and Minnesota Railroad Company and others are defendants ; as full, true and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation, with the acceptance of service endorsed thereon, is hereto attached and returned herewith.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at Des Moines, in the said district, this 16th day of March, A. D. 1881.

[SEAL.] E. R. MASON,
Clerk U. S. Circuit Court, central div., dist. of Iowa.

(Endorsement on cover:) Iowa C. C. U. S.; No. 316 ; John A. Burnham and James H. Blake, trustees, appellants, *vs.* E. H. Bowen ; filed 28th September, 1881 ; 75 pages.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1883.
NO. 316.

JOHN A. BURNHAM AND JAMES H. BLAKE, TRUSTEES,
Appellants,

vs.

E. H. BOWEN, *Respondent.*

APPELLANTS' BRIEF.

JOHN W. CARY,
Of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1883.
NO. 316.

JOHN A. BURNHAM AND JAMES H. BLAKE, TRUSTEES,
Appellants,

vs.

E. H. BOWEN, *Respondent.*

The appeal in this case is from a decretal order made on the 30th day of October, 1880, in favor of E. H. Bowen, an intervening creditor of the Chicago, Dubuque & Minnesota Railroad Company, in a suit prosecuted by the appellants as trustees, to foreclose a mortgage given by said Railroad Company for the benefit of the bondholders, directing that Bowen recover judgment for $6,515.40, with interest and costs, against the Chicago, Dubuque & Minnesota Railroad Company, and adjudging that the property mortgaged to the appellants as trustees is equitably bound for the payment of the same, and that if the same is not paid within sixty days that said mortgaged property shall be sold at public auction by one of the masters of this court.

This was an action originally brought in the Circuit Court for Dubuque County, Iowa, in January, 1875, by Burnham and Blake, trustees, to foreclose a mortgage executed by the Chicago, Dubuque & Minnesota Railroad Company on the 1st day of June, 1871, to them as such trustees, to secure the payment of $4,425,000 of bonds with interest. (*Record, folios 42–58.*) A receiver of the mortgaged property was appointed January 13th, 1875, by the state court. The cause was removed to the Circuit Court of the United States for the District of Iowa, on the 11th day of January, 1876, and a receiver appointed by that court June 23d, 1876. (*Record, folios 24 and 30.*) Such proceedings were afterwards had in said Circuit Court of the United States that on October 28th, 1876, a final decree of strict foreclosure

was entered in said cause, in which the court found that $5,980,-166 was due on said mortgage, with eight per cent. interest until paid, together with the costs; and the defendant Chicago, Dubuque & Minnesota Railroad Company was ordered and decreed to pay the same to said complainants within ninety days from the date thereof, and in default of such payment to the complainants of said principal, interest and costs, by the time mentioned, it was ordered and decreed that said defendant Chicago, Dubuque & Minnesota Railroad Company, and all persons claiming under it, should stand absolutely barred and foreclosed of all right, title, interest and equity of redemption in the mortgaged premises, and the right and title to all of said mortgaged property should be vested in said complainants free from all right, title or equity of redemption in said Chicago, Dubuque & Minnesota Railroad Company. And it was further ordered that said trustees should have immediate possession of said property from the date of said decree, and the net income thereof from the commencement of this action, and the receiver of said court was directed to deliver to said trustees the said property forthwith, and upon the settlement of his accounts, to deliver to them any balance which might be found due from him as such receiver.

Said decree further provided that before said net income or money on hand should be paid over to said trustees, the said trustees should file with the clerk of said court a bond, with sufficient sureties, stating the amount of money so received by them, and conditioned that they would hold the amount of money subject to any future order of this court, for the benefit of Haskill & Barker Car Company, in case they should thereafter be adjudged entitled thereto, or any part thereof.

The said decree further ordered that any balance that should be found in the hands of the receiver appointed by the state court, which the court might determine to belong to the mortgage fund, or in which the mortgagees or others now in court might have any right, should be paid into court for the benefit of the complainants or such of the defendants as the court might determine on a further hearing of the cause.

It was further provided in said decree as follows:

"It is further decreed that this cause, with all the matters in controversy between the plaintiffs and all and any of the defendants and intervenors and claimants, is continued until the next term of this court, and such rights and claims and matters in controversy are in no wise affected or determined by this decree, and the said trustees, and all persons claiming under them, take said property under this decree, subject to such

orders and decrees, charges and liens, as may hereafter be made, or ordered or decreed, concerning such claims, interventions and demands, at the instance and upon the motion of John M. Forbes and others who are interested in this decree, as holders of some of the bonds upon which this suit is founded; *provided*, that this decree is taken subject to the provisions of the agreement entered into under date of July 9th, 1875, and the right is hereby reserved to the mortgage bondholders to litigate in this cause hereafter, or otherwise, any and all of the questions specified in said agreement, it being understood that the matter of the priority of certain bonds over others, and the right of certain bondholders to be preferred over others in said mortgaged property and the proceeds thereof, and all right to damages or personal claims on behalf of any of said bondholders against the parties signing said agreement of July 9th, 1875, are hereby expressly reserved for future consideration and determination, unaffected by the provisions of this decree." (*Record, folios 26–38.*)

In pursuance of said decree, the receiver surrendered said mortgaged property and the trustees immediately took possession of said railroad, its appurtenances and fixtures, but no funds were turned over by the receiver to the trustees or purchasers under said decree of October 28th, 1876, but the balance of such funds in his hands were paid into court and were afterwards paid out on its order. (*Record, folio 24.*) No part of the net income of the road was at any time applied to the payment of the interest of the bonds secured by the mortgage named in this suit. (*Record, folio 17.*) No funds came into the hands of the receiver of said property from the said Chicago, Dubuque & Minnesota Railroad when he took possession of the same. (*Record, folio 25.*)

Afterwards, and on May 28th, 1877, the final accounts of the receiver came before said court, after having been referred to a master, and there being no exceptions, the same were in all respects confirmed; and thereupon it was ordered, adjudged and decreed that of the balance of the money reported in said receiver's hands, viz: $4,111.61, the said receiver be allowed to retain the sum $1,300 as increased pay and for expenses, and that the balance of said money be deposited with the clerk of the court to abide the further order of the court, and upon the said receiver filing the receipt of said clerk he should thereupon be discharged.

Afterwards, and on the 18th day of October, 1878, E. H. Bowen, by Shiras, Van Duzee & Henderson, filed his so-called substituted petition in this cause, in which he set forth that by the

leave of the court he files this petition in lieu of one heretofore filed and mislaid or lost from the files, and claims to be due petitioner from the Chicago, Dubuque & Minnesota Railroad Company the sum of $5,815 and interest, and for cause of said claim avers that heretofore, to-wit, on the 17th day of May, 1875, the said Chicago, Dubuque & Minnesota Railroad Company became indebted to the Northern Illinois Coal & Iron Company, for coal and materials furnished said respondent for use in running and managing said railroad, and being so indebted, the said company accepted a draft drawn in the words and figures following:

"$2,354.10. MENDOTA, ILL., May 17, 1875.

"Four months after date pay to the order of E. D. Taylor, Pres't, two thousand three hundred fifty-four 10-100 dollars, value received, and charge the same to account of

"E. D. TAYLOR, *Pres't.*

"To Chicago, Dubuque & Minnesota Railroad Co., Dubuque, Iowa."

Which was accepted, payable at the Third National Bank of Chicago, by C. H. Booth, Treasurer of Chicago, Dubuque & Minnesota Railroad Company, which draft was endorsed and transferred to the petitioner, who is the holder thereof.

The petition then, in like manner, sets forth the making of another draft in the words and figures following:

"$2,372.86. MENDOTA, ILL., June 16, 1875.

"Five months after date pay to the order of E. D. Taylor, Pres't, two thousand three hundred and seventy-two 86-100 dollars, value received, and charge the same to account of

"E. D. TAYLOR, *Pres't.*

"To Chicago, Dubuque & Minnesota Railroad Co., Dubuque, Iowa."

Accepted, payable at the Third National Bank, Chicago, Illinois.

C. H. BOOTH,
Treasurer C. D. & M. R. R. Co.

Which draft was also endorsed and transferred to the petitioner, who is the holder thereof.

Said petition further alleges that said claims were presented to the Circuit Court of Dubuque County while the cause was there pending, and the amount due petitioner ascertained and fixed, and the receiver ordered to pay the same, being classed among operating expenses of said railroad.

The petition further claims that the sum of $5,815 is due, and prays that the order of allowance of said claim, made by

the Dubuque Circuit Court, be enforced by this court and judgment be rendered for the amount due against said Chicago, Dubuque & Minnesota Railroad, and that such judgment be declared a lien on the property of the road of said company in the hands of the trustees and their grantees. (*Record, folios 4–8.*)

On the 19th of May, 1879, the complainants answered said petition denying the statements thereof as therein set forth, and denying that said claim was presented to the Circuit Court and an order made to pay the same, and then set forth the making of the mortgage to the complainants as trustees and the foreclosure thereof; that no funds came to the hands of the receiver from the said Chicago, Dubuque & Minnesota Railroad Company, and that whatever income was derived from the operation of the road by the receiver was necessarily used in operating, preserving and repairing said road, under the order and direction and with the approval of the court, and that no funds were by him turned over to the purchasers of said property and none on which said claims were a lien or out of which it could be paid; that the claim of the petitioner is not a lien upon the mortgaged property or its income or revenues, and that whatever lien or claim he may have is inferior to the lien and claim of the complainants; that it was not a part of the operating expenses, and deny that it was ever allowed by the Circuit Court, or that the claimant has any lien therefor.

On the hearing it was stipulated:

1st. That the drafts were drawn and accepted as alleged, and that the petitioner is the owner thereof.

2d. That said drafts were given as evidence of indebtedness due and owing from said Chicago, Dubuque & Minnesota Railroad Company in renewal of other drafts of earlier date accepted by said company, the consideration of which was coal furnished said company and used in running its locomotives, and the coal so used was furnished in the year 1874, before the commencement of foreclosure proceedings.

3d. That no part of the net income of the road was at any time applied to the payment of interest on the bonds secured by the mortgage named in the suit. (*Record, folios 16–18.*)

4th. That in 1871, the railroad company contracted to purchase of Margaret Henijes two lots and a building in Dubuque, since and now occupied as a depot, for $7,000, to be paid in annual payments of a thousand dollars each, with interest, and that on June 5th, 1876, a decree of foreclosure was rendered on this property in favor of Margaret Henijes against the railroad for $7,898, the balance then due, and that this sum, aggregating $7,998, was paid out of the earnings of the road;

payments made from June 5th, 1875, to September 4th, 1876, and that this property was covered by the mortgage and passed to the trustees.

5th. That $14,897.94 was paid in 1876 ($5,000 being paid June 28th, and $9,897.94 November 1st), in settlement of a judgment for right of way over certain property in Brownsville, Minnesota, the judgment for which was rendered January 8th, 1875.

6th. That in addition $3,020.55 were paid in setlement of judgement for right of way—$945.55 in 1875, and the balance in 1876.

All of this right of way was taken prior to the commencement of foreclosure proceedings for the use of the road, and was covered by the trustees' foreclosure, all of which moneys were received from the ordinary income of the railroad, and said payments were made by the receiver on the order of the court. (*Record, folios 19–22.*)

No funds were ever turned over by the receiver to the trustees or purchasers under the decree of October 28th, 1876, but the balance of such funds were paid into court and have been paid out under its direction. On January 5th, 1876, the Circuit Judge of Dubuque county made an order in reference to this claim of Bowen and others as follows:

"This allowance is not intended to allow or establish any lien, but simply to allow them to be presented and determined as to their rights of payment on final hearing."

This was the only order made in relation to it in that court. (*Record, folios 23–25.*)

On the hearing of this petition and on this evidence the decretal order, as mentioned, was made by the court below, from which the appeal is taken.

ASSIGNMENT OF ERRORS.

FIRST. *There was never any diversion in this case.*

(a). *The receipts prior to the foreclosure were never used for permanent improvements.*

(b). *No part of the income, either gross or net, was ever used to pay the interest or principal of the bonded debt.*

(c). *No fund, arising either from the operation of the road or otherwise, came to the hands of the receiver at the time of his appointment. It was, therefore, error to order restoration from the corpus of the property or the income coming into the receiver's hands.*

SECOND. *The mortgage covered the income of the property, and after the property was taken possession of by the receiver that income prima facie belonged to the bondholders, and its disposition by the court could not authorize a sale of the corpus of the property to satisfy the claim of an unsecured creditor.*

THIRD. *The intervenor's debt was not one specially entitling him to preference. He was guilty of laches which should prevent his recovery, and there was no fund out of which it could be paid. We, therefore, insist that the decree in this case should be reversed.*

The record on this appeal presents the question of the rights of an unsecured general creditor of the mortgagor, in the property mortgaged, as against the mortgagee. The property in question was mortgaged to the appellants on the 1st day of June, 1871. In a suit brought by them to enforce the lien of that mortgage, and on the 18th day of October, 1878, nearly two years after a final decree of strict foreclosure had been entered, forever baring the mortgagor and all persons claiming under him from all right, title, interest or equity of redemption in the mortgaged premises, the appellee intervenes and claims that he is the holder of two unsecured acceptances of the mortgagor given in 1875, upon which there is due him about $6,000, for which he prays judgment against the mortgagor, and that such judgment be declared a lien on the mortgaged property in the hands of the appellants. The petition states no reason why the judgment for this claim should be made a lien on the property of the appellants, and no reason why such lien should be prior or superior to the appellant's title. However, on the hearing, the court granted the prayer of the intervenor, and in and by its decree adjudged and declared that the property mortgaged to the appellant is equitably bound for the payment of said debt; and further adjudged and decreed, that it be sold to pay and satisfy the same. Why this particular property, formerly belonging to the debtor, is equitably bound for the payment of this debt does not appear, or why this equitable lien is prior and superior to the legal mortgage. The mortgage lien took effect June 1st, 1871, but the consideration for the acceptances, upon which said judgment is rendered, did not move to the debtor until some time in 1874. The reason of this decision, therefore, is not apparent. The record fails to disclose any ground or reason for such decision, and unless we are to adopt the conclusion that the court intended to hold that in debts of railroad companies, a debt of a general character, unsecured, takes precedence of a debt secured by mortgaged deed, as to the property mortgaged, and will be enforced

against such property in the hands of the purchaser after foreclosure, it is difficult to account for this decision. It is probable that the court below supposed that this was a case within the rule adopted by courts of equity granting relief to material men and employes of railroad companies as against mortgagees. But the record is so bare of any facts authorizing such a finding that we could not entertain that opinion, were it not that the same court, on a recent occasion, solemnly adjudicated that the salary of a president of a railroad company, for between one and two years prior to the appointment of a receiver, was such a claim, and should be allowed in preference to the rights of the bondholders. As we understand the decision of this court in Fosdick *vs.* Schall (99 U. S. Rep., 235), a very different rule from that upon which the court below must have acted, was laid down for our guidance in this respect, which, if followed by the court below, would have resulted in a decision very different from that now complained of. There is no pretence in this case that there had been, prior to the appointment of the receiver, any diversion of a fund applicable to the payment of the unsecured debts of the company. On the contrary, the record distinctly shows that not only the gross income had not been applied to the benefit of the mortgagees, but no part of the net income even; and had there been such diversion, still the appellee was entitled to be considered only as a general creditor of the mortgagor, and not entitled to any special equity as against the parties holding the legal mortgage. The record shows neither of the two essential conditions laid down by the decision of this court in Fosdick *vs.* Schall, necessary or requisite to enable the appellee to recover in this case: 1st. No diversion has been shown; therefore, nó restoration should be made. 2d. The intervenor's situation is that of a general creditor of the mortgagor without special equity.

I.

There was never any diversion in this case.

FIRST. *The receipts prior to the foreclosure were never used for permanent improvements.*

SECOND. *No part of the income, either gross or net, was ever used to pay the interest or principal of the bonded debt.*

THIRD. *No fund, arising either from the operation of the road or otherwise, came to the hands of the receiver at the time of his appointment. It was, therefore, error to order restoration either from the*

corpus of the property or the income coming into the receiver's hands from the operation of the road.

There were no conditions attached to the appointment of the receiver in this case. The mortgage was a lien upon all the property prior and superior to any claim of the intervenor, either legal or equitable. Nothing had ever been taken from the income for the benefit of the mortgage, either by way of payment or improvement of the property. There was, therefore, no equitable ground upon which the unsecured claim of the petitioner could be preferred to the legal mortgage of the bondholders. No interest on the bonded debt had been paid; no equipment provided, or lasting or valuable improvements made out of the earnings. No debts were left unpaid on account of any such diversion, for no payments of that kind were ever made. Hence there was no equitable right which the intervenor could claim that his unsecured debt should be paid out of the income of the receivership even. No fund which could equitably be claimed by the intervenor had ever been applied in any way to the benefit of the mortgage. In *Fosdick vs. Schall*, 99 U. S. Rep., 235, this court lay down the rule that restoration may be made in cases where the company have made improper diversion of its income and applied that to the payment of interest or for permanent improvements that should have gone to pay current expenses. But if the bondholder has not received anything, either by way of payment or improvement of the property, from the income of the road, prior to the appointment of the receiver, which ought to have gone to the creditors, there is no ground to claim that the fund arising either from the operation of the road by the receiver or from the sale of the mortgaged property, can be charged with their equities. In order to warrant such an application of these funds, *prima facie* belonging to the bondholders, the intervenor must show an equity based upon the wrongful application of the income of the company. In the case above cited, this court reversed the order made by the court below, and held that the fund arising from the operation of the road by the receiver *prima facie* belonged to the bondholders, and that the intervenor had shown no equitable right to payment out of the fund in court. He had not shown that any portion of the earnings of the road, prior to its passing into the hands of the receiver, had gone to pay interest or to the making of permanent improvements upon the property, by which the bondholders had been benefited, and consequently the fund in court, arising from the sale of the road, thereby increased, and it was only upon that basis that any equitable claim could have been established against that fund in favor of the intervenor.

The record in this case shows that no diversion of the funds has ever taken place. No part of the income has ever been applied by the company to permanent improvements, and no part of it, either gross or net, had ever been used to pay any interest or principal of the bonded debt, and no fund of the company was received by the receiver on his appointment. There was, therefore, no diversion. No equity could arise in favor of the intervenor as against the mortgagee, and the decree of the court below giving a preference to the claim of the intervenor over the mortgagees was erroneous and should be reversed.

This court say, in Fosdick *vs.* Schall: "*Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion.*"

II.

The mortgage covered the income of the property, and after the property was taken possession of by the receiver that income prima facie belonged to the bondholders, and its disposition by the court could not authorize a sale of the corpus of the property to satisfy the claim of an unsecured creditor.

It has already been shown under the previous point there was never any diversion of the income by the company prior to the appointment of a receiver. In such a case the disposition by the court of the income arising during the continuance of the receivership could not create a diversion, and could confer no rights upon unsecured creditors to claim a restoration on that account, for under the decision of this court and all the well-considered cases, the unsecured creditors have no interest in the income arising from the property during the receivership, unless there has been a previous diversion. They can only be interested in the income of the receivership where there has been a diversion which they are entitled to have restored, or where the fund with the mortgaged property may exceed the amount of the mortgage debt. So long as the mortgage deed remains unpaid and there has been no previous diversion, the income of the receivership is exclusively the property of the mortgagee, and no unsecured creditor can complain that it is applied to the protection, improvement or betterment of the mortgaged property. In the case already cited

the Chief Justice, in his opinion, says: "*Prima facie that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome.*" So in this case, there is no attempt in the record to show that that fund in the present case did not belong to the mortgage creditors. Yet, in looking for a reason for the extraordinary decree entered, we find in the testimony that certain payments made during the receivership are made prominent, and from that fact suppose that it is possible that the court below may have been of the impression that these payments were a diversion of the fund which might have gone to the unsecured creditors. But such is not the case. They were no more entitled to the income of the property during the receivership, where there had been no previous diversion, than they were to the property itself. The revenues and income of the road are expressly named in the mortgage as conveyed to the mortgagees; and under the decisions of this court, after possession of the property has been taken by the receiver at the instance of the mortgagees, that income belongs to the mortgagees, subject only to the right of the court to decree therefrom restitution for whatever may have been theretofore improperly diverted by the company from the earnings of the road.

Galveston Railroad vs. Cowdrey, 11 Wallace, 459; *Gilman vs. Illinois & Mississippi Telegraph Co.*, 91 U. S. Rep., 603; *American Bridge Co. vs. Heidelback*, 94 U. S. Rep., 798.

Notwithstanding the fact that the record in this case shows no diversion of the fund by the company prior to the appointment of the receiver, and the acknowledged fact that the income during the receivership belonged exclusively to the mortgagees, and that there is no fund in court, yet the decree makes this claimant's lien prior and superior to the mortgage, and directs a sale of the mortgaged property to satisfy it. We know of no precedent for such a decree in such a case, except one in the same court to enforce the payment of the salary of the president above referred to. This decree directs a sale of the mortgaged property, as it existed at the date of the mortgage, including all improvements, to pay this unsecured claim, wholly ignoring the legal lien of the mortgage thereon made June 5th, 1871. The right of the mortgagees to this property is a purely legal one. They stand in no need of a chancellor's aid to secure and enforce that right. Is it competent for a court of equity to disregard it and hold that a mere unsecured claim against the debtor, arising years afterwards, shall have priority over such legal right? Supposing a sale of the mortgaged property to have been made under this decretal order, how would

it affect the right of the legal mortgagee? Would he be thereby deprived of his property? The question of selling the corpus free and discharged of the mortgage lien on such a decree is a very different one from an order disposing of funds in court. Contests of this kind have heretofore been over funds in court, and in nearly all the cases the funds arising under the receivership. I am aware of the language of the Chief Justice in *Fosdick vs. Schall*, in which he says: "*While ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way.*" It is not necessary to the point which I am now making, that I should contest the statement there made; granted, even in a case where the mortgagee has, under a decree on his mortgage, made a sale and brought the fund into court, that fund may be subject to the equity mentioned. But here is a case where the mortgagee has made no sale and does not propose to make a sale of the property, but has procured a strict foreclosure, and nearly two years afterwards the chancellor, on the application of a general creditor, decrees his debt an equitable lien upon this property and directs a sale of it, wholly overriding and disregarding the legal lien and force and effect of the mortgage.

It is respectfully submitted that the action of the court below was not authorized, and that no considerations of policy in regard to the management or control of railroads, can authorize or justify such an interference with legal rights.

III.

The intervenor's debt was not one specially entitling him to preference. He was guilty of laches which should prevent his recovery.

1st. From the record it appears that the intervenor was the purchaser of the negotiable acceptances of the debtor company. He was not an employe or material man, nor had he furnished supplies, but he is a purchaser simply of negotiable paper of the debtor company, which paper was given in renewal of other paper of like description of the company, and the original consideration of the debt was for coal furnished, not by the intervenor, but by the Northern Illinois Coal & Iron Company, in the year 1874, but at what time of that year does not appear. It does not appear that this intervenor was in any way connected with that company, or that it, is in any manner interested in his

success in this proceeding. He claims here as endorsee and holder of this negotiable paper under the Law Merchant. He is, therefore, in the broadest sense, a general creditor of the mortgagor, without any other rights than any other general creditor, with no special equities, and no right to claim as employe or material man. His claim is certainly no better than that of one who might have loaned money to the mortgagor, and upon no principle could his claim be preferred to the mortgage, unless, as stated by Mr. Justice Coffer in his dissenting opinion in Douglas *vs.* Cline, 12 Bush., 608, where he says, that "*if such claims are to be allowed to the exclusion of the mortgagees, there will remain no debts to be paid but the mortgage debts, and these being postponed to all others it will result that the only persons not secured are those who alone had taken security for their debts.*"

2d. If this claim were otherwise entitled to preference, was there such diligence in its prosecution as would entitle it to the decree of the court? The original consideration of the debt, it appears, was for coal furnished the mortgagor and used in the year 1874. The bill of foreclosure in this case, as we have seen, was filed in the state court in January, 1875, and on the 13th day of that month a receiver was appointed. The cause was removed to the federal court January 11th, 1876, and a receiver in that court appointed June 23d, 1876, and on October 28th, 1876, a final decree of strict foreclosure was entered and the property delivered to the mortgagees. On the 17th day of May and the 16th of June, 1875, the coal company, the original creditor, takes the acceptances of the company in renewal of other acceptances for this debt, running four and five months, and the first knowledge of any claim against the property disclosed by the record is an entry made in the Circuit Court of Dubuque County on the 5th day of January, 1876, about one year after the appointment of a receiver. No further action, it appears, was taken in the premises until the filing of the intervening petition on the 18th day of October, 1878. As to the time when the coal was furnished the only thing disclosed by the record is found at folio 17, and is in these words: "*The consideration of the acceptances was coal furnished to said C., D. & M. R. R. Co., and used in running its locomotives along the line of its road, the said coal being so furnished and used in the year 1874.*"

It does not appear, therefore, when this coal was furnished, except that it was furnished and used in 1874. *Non constat,* but that it was all furnished more than six months prior to the 1st day of January, 1875, and the longest time allowed in any of the cases for material men to claim a lien for such supplies has

been for six months prior to the time of the appointment of a receiver. It does not appear that this coal was furnished within that time.

3d. Would it be competent for a material man intending to hold a lien upon the property as against a prior mortgage to take a new acceptance of this debt from four to six months after the appointment of a receiver, running four or five months, and then for the holder of such new acceptance to make claim upon the property?

4th. Was it proper diligence to allow the matter to sleep from the time it was first presented to the court until some two years after the property had been surrendered to the mortgagees, before formally presenting and pressing the claim?

I have already shown that there was no fund in court out of which this debt could be paid. Reference is also made, in addition to the authorities cited, to *Jones on Railroad Securities*, sections 557 to 566; *Denniston vs. Chicago, Alton & St. Louis Railroad*, 4 Bissel, 414; *Kelley vs. Receiver*, 10 Bissel, 151.

JOHN W. CARY,
Of Counsel for Appellants.

11-776

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1883.
NO. 316.

JOHN A. BURNHAM AND JAMES H. BLAKE, TRUSTEES,
Appellants.

vs.

E. H. BOWEN.

APPELLEE'S BRIEF.

D. B. HENDERSON,
F. B. DANIELS,
Of counsel for Appellees.

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1883. NO. 316.

JOHN A. BURNHAM AND JAMES H. BLAKE, TRUSTEES.
Appellants.

vs.

E. H. BOWEN.

APPELLEE'S BRIEF.

I.

Statement: The proceedings below were instituted by appellants to foreclose a railroad mortgage under which they were the trustees. Appellee interveñed with a claim, amounting at final order to $6,515.40, of which the consideration was coal furnished the railroad company and used in running its locomotives along the line of its road. The mortgage was dated in 1871, default was made upon the first and subsequent coupons, the coal was furnished and used in 1874, and the foreclosure proceedings were instituted and receiver appointed in January 1875. Intervenor's claim was allowed in January 1876 (*Record, folio* 24) but the hearing and decree upon his right to a lien were not had until 1880. (*Record, folios*, 15, 60). The principal decree, in the nature of a strict foreclosure, was entered October 28th, 1876. It passed the property over to the mortgagees but subject to, and expressly reserving, the rights of intervenor. At the hearing upon intervenor's claim, it was made to appear (*Record, folios*, 19–23) that of the funds derived by the receiver from the ordinary income of the railroad from its freight and passenger business and other sources, not including, however, any money received from sale of bonds, the receiver with the approval of the court, used the sum of $25,916.49—being an amount largely in excess of intervenor's claim—in paying for permanent betterments which passed to the mortgagees under the decree. The

larger portion of this was paid subsequent to the allowance of intervenor's claim. The court found that intervenor was entitled to payment out of the property which passed to the mortgagees under the decree of foreclosure, and gave judgment and decree accordingly, from which the mortgagees appeal.

II.

In Iowa the mortgagor has the general right of possession during the foreclosure proceedings. Barrett vs. Blackmar, 47 *Iowa*, 565. But notwithstanding this fact a court of equity will, it seems, in a proper case, take this possession from the mortgagor and vest it in one of its officers. The court exercises this power, not for a purpose tantamount to placing the mortgagee in possession, but to prevent waste, mismanagement or misappropriation of funds by the mortgagor. The receiver is not the agent of either party. He is the representative of the court. If in a given case it could be certainly determined in advance that the mortgagor would manage the property with perfect prudence and good faith, no receiver would in such case be appointed. It is not intended that the appointment of a receiver shall work a revolution regarding the business of the road and the rights of its creditors. It is intended that such debts as in good faith and justice ought to have been paid by the railroad company if it had continued in possession, may still be paid by the receiver. The appointment of a receiver suddenly wrests from the company the means of using current revenues to pay current bills for operating expenses. But this fact does not argue that the court will not require its officer to pay such bills. As this court has declared, the court will classify these claims and "on an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights." "In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company, and are subject to its control." "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he call upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may, with propriety, be required to submit to the operation of a rule which always applies in such cases, and do equity in order to

get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order, that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied." And referring particularly to railroad mortgages, the court says: "The income, out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings, what is required for necessary operating and managing expenses." "Every railroad mortgagee in accepting his security, impliedly agrees that the current debts made in the ordinary course of business, shall be paid from the current receipts before he has any claim upon the income."

Fosdick v. *Schall*, 99 U. S. 235. See also: High on Receivers, Chapter 1 and Story Eq. Jur. §§ 829, 831, 835.

III.

Applying these principles to the case at bar, we find that the mortgage was given in 1871, and default was made on it from the first, no part of the net income of the road having ever been applied to the payment of the interest (*Record, folio* 17), and the whole interest being included in the amount of the decree of foreclosure (*Record, folio* 32). The bondholders did not see fit to proceed, as they had the right to do, when the default had continued for thirty days. On the contrary, notwithstanding no payments of interest had been made, they allowed the company to operate the road and incur obligations therefor, for some three years until January, 1875. Prior to the appointment of the receiver, the gross earnings do not appear to have been enough to pay expenses, for they were not applied to interest, the amount of intervenor's claim, upwards of $5000, remained unpaid and no funds were turned over to the receiver by the company, (*Record, folio*, 25.) But after the appointment of the receiver the earnings yielded a very considerable surplus, for upwards of $25000 was expended in permanent betterments (*Record, folios* 20, 21, 22), and nearly $3000 remained in receiver's hands at final accounting (*Record, folio* 40). There cannot be a doubt that it was for the interest of the bondholders that the road should be kept in operation, and it was certainly not an abuse of judicial discretion for the court to order that debts incurred by the company in thus protecting the security should be paid from the income of the receivership, if, in consequence of an increase of revenue, it could be done. The income of the receivership, instead of being applied to pay the debts for

the supplies was used to pay for right of way and depot grounds which passed to the bondholders under the decree. If instead of a strict foreclosure there had been a sale according to the usual practice in the State of Iowa, and the proceeds of such sale had been brought into court for distribution in cash, and it had appeared that during the receivership the fund which in equity belonged to the labor and supply creditors, had been for the time being diverted from them and put into improvements and additions the proceeds of which constituted $25000 of the fund in court, it would have been clear that intervenor would have been entitled to be paid out of this $25000. *Union Trust Co. vs. Souther* 107 U. S. 591. That the mortgagees preferred a strict foreclosure under which they took the benefit of these additions in kind is a mere matter of procedure not affecting any substantial right. The circuit court so regarded the case and made provision in the decree for all parties in a manner equivalent to that usually arising upon the distribution of the money.

This coal was furnished in 1874, the third year of the default. The coal company and the mortgagees must both be presumed to have known the laws of Iowa which entered into and formed a part of their contracts, and to have acted in reference thereto. By these laws the mortgagee's possession of the road and control of its earnings was not to terminate at the commencement of foreclosure proceedings, but was to continue during their pendency and the power of sale contained in the mortgage was of no effect.

Laws of 1858, Chapter 24, Revision, Secs. 3660, 3673, 4179, Condensed in the Code, as follows: "*Sec. 3319. No deed of trust, or mortgage of real estate, with or without power of sale, made since the first day of April, A. D. 1861, shall be foreclosed in any other manner than by action in court by equitable proceedings.*" *Barrett* v. *Blackmar*, 47 Iowa 565.

The coal company, therefore, had the reasonable right to expect that the railroad company would continue in possession a sufficient time to pay for this coal in usual and due course. That the mortgagee succeeded in inducing the court of chancery to put forth its extraordinary powers and appoint a receiver at the commencement of the proceedings, should not be allowed to affect the rights of the parties or deprive them of the benefit of the circumstances on the faith of which they contracted.

Appellants seem to think that there is a defect in appellee's case in that it is not shown that the coal was furnished within

six months preceding the receivership. We are unable to see any point in this objection. It happens that in the case of *Union Trust Co.* vs *Souther*, 107 U. S. 591, the court of its own motion at the time of appointing the receiver, made a general order for the receiver to "pay and discharge all amounts due and owing by said railroad company for labor or supplies, that may have accrued in the operation and maintenance of such railroad property within six months." In like manner in *Miltenberger* vs. *Logansport Railway Co.*, 106 U. S. 286, the court when appointing the receiver made a general order requiring him "to pay the arrears due for operating expenses for a period in the past not exceeding ninety days." No point was made of the exact length of the period in either case. *Non constat* that the period was not suggested to the court as being supposed to include all such outstanding claims in the given case, and in preference to a shorter period rather than in preference to a longer period. However that may have been, the propriety of such limitations is apparent enough in a general order made at the commencement of a receivership, but they certainly cannot be taken to fix an arbitrary test for the allowance or rejection of particular claims when passed upon singly by the court itself. Indeed in the *Miltenberger* case the court seems to have allowed specific claims which were not included in these general orders. See *Miltenberger* vs. *Logansport Railway Co.* 106 U. S. at pages 304, 305, 308.

Neither of the last two cases had been decided at the time of the hearing and order now under consideration, and it is evident that neither the court nor the counsel for either party regarded it as material in which half of the year 1874 this coal was furnished. The court had before it the case of *Fosdick* v. *Schall*, 99 U. S. 235, in which this court clearly lays down the doctrine "that the possession taken by the receiver is only that of the court whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles, it would if no change of possession had taken place." And either at the time of appointing the receiver or subsequently in the progress of the cause "the court, in the exercise of a sound judicial discretion, may * * * impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable." There

cannot be a debt having a stronger claim upon the current revenues than one created for coal. Fuel and labor are equally essential to the operation of the road. Good faith is more necessary towards bills for them, than towards ticket and freight balances due connecting lines, which were allowed in the *Miltenberger* case without reference to any particular number of days or months. Intervenor is not guilty of any laches. He filed his claim promptly. The exact date does not appear for the original petition is lost. But an allowance thereon was made January 5th, 1876, within a year after the appointment of the receiver and long before the decree of foreclosure. (*Record, folio* 24.)

An objection is urged to the equity of the coal company, on the ground that it took acceptances from the railroad company instead of standing upon its original accounts. We have yet to learn of a lien being lost by simply taking such an evidence of indebtedness from the original debtor. It is no additional security. It is merely a convenience to the transaction of business, which is almost universally practiced. It may have been done in this case for the purpose of putting the claim in convenient shape for assignment, or as a method of enabling intervenor to purchase it. By the purchase, intervenor became entitled to all the rights of the coal company. *Union Trust Co.* vs. *Walker*, 107 U. S. 596.

Counsel for appellants devotes the larger portion of his brief to the contention that these claims for supplies will be preferred only when the current revenues have been diverted to the benefit of the bondholders *prior* to the receivership. He says (page 9): "In *Fosdick vs. Schall*, 99 U. S. Rep., 235, this court lay down the rule that restoration may be made in cases where the company have made improper diversion of its income and applied that to the payment of interest or for permanent improvements that should have gone to pay current expenses. But if the bondholder has not received anything either by way of payment or improvement of the property, from the income of the road, prior to the appointment of the receiver, which ought to have gone to the creditors, there is no ground to claim that the fund arising either from the operation of the road by the receiver or from the sale of the mortgaged property, can be charged with their equities." This court, however, has taken precisely the opposite ground and held that the right of the court to apply the income of the receivership to the payment of supplies furnished the company "does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest instead of current expenses." *Union Trust Co.* vs. *Souther* 107 U. S. 594. This last case was one

where the income prior to the receivership was not sufficient to pay expenses and was not diverted by the company. The diversion for permanent improvements was made by the receiver, and because of such diversion during the receivership, Souther's claim for supplies previously furnished the company was required to be paid out of the funds resulting from the sale of the property. And this though the sale did not come within $300,000 of producing enough to pay the mortgage debt. See also *Douglass vs. Cline* 12 Bush 608, and *Gurney vs. Atlantic & G. W. Ry. Co.*, 58 N. Y. 358.

Counsel also says (Page 11): "The right of the mortgagees to this property is a purely legal one. They stand in no need of a chancellor's aid to secure and enforce that right." Counsel has here entirely overlooked the statutes of Iowa. See Code 3319, above printed. Whatever may be the rule of the common law, or in other States, there is no process by which the holder of a mortgage of real estate in Iowa, executed since April 1st 1861, can legally enforce his rights except by "a chancellor's aid" His rights are purely equitable. See on this point *Newport & Cincinnati Bridge Co.* vs. *Douglass*, 8 Bush, at pp. 202, 204, 205.

Counsel on same page (11) cites *Galveston Railroad* vs. *Cowdrey*, 11 Wall 459; *Gilman* vs. *Illinois & Mississippi Telegraph Co.*, 91 U. S. 603 and *American Bridge Co.* vs. *Heidelback*, 94 U. S. 798, as holding that the income during the receivership "belongs to the mortgagees, subject only to the right of the court to decree therefrom restitution for whatever may have been theretofore improperly diverted by the company from the earnings of the road." None of these cases hold this. They do hold that in case of a mortgage expressly purporting to convey the income, the mortgage has before possession no lien on such income as against other creditors. These cases argue somewhat from the right of the mortgagee to protect himself by taking possession. But though one of the cases was from this State the peculiar statutes of Iowa were not under consideration, and neither case can be taken as authority for the doctrine that the mortgagee here has any right to possession as an incident to the foreclosure proceedings. Nor does the fact that the principle decree at bar was one of strict foreclosure prove anything. Substantial rights constituting a rule of property must be preserved whatever be the mode of procedure. The court was accordingly particular to protect the rights of the intervenor in a practicable manner without regard to the general form of the foreclosure.

When counsel for appellant says, as above quoted: "The right of the mortgagees to this property is a purely legal one. They

may be paid. The court below has so ordered and we pray this court to affirm the order.

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F. B. DANIELS,
Of counsel for Appellee.